Adulteration of the pea and barley feed was alleged in the information for the reason that certain substances, to wit, buckwheat, buckwheat hulls, oats, corn, millet, sorghum, bean hulls, weed seeds, millet hulls, whole barley, pearl barley, peas, and limestone, had been mixed and packed with the said article so as to injuriously affect its quality, and for the further reason that certain substances, to wit, buckwheat, buckwheat hulls, oats, corn, millet, sorghum, bean hulls, weed seeds, and limestone, had been substituted in part for pea and barley feed, which the said article purported to be.

Misbranding of the said pea and barley feed was alleged for the reason that it was food in package form, and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

Adulteration of the fine ground flax screenings was alleged for the reason that a flax by-product, to wit, flax straw, had been mixed and packed therewith so as to lower and reduce and injuriously affect its quality and strength and had been substituted wholly or in part for fine ground flax screenings which the said article purported to be.

Misbranding of the said fine ground flax screenings was alleged for the reason that it was a product composed mainly of ground flax straw, prepared in imitation of and offered for sale under the distinctive name of another article.

Adulteration of the barley and flax was alleged for the reason that it was a product consisting principally of various weed seeds with traces of ground grain and flax screenings, which had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength to the extent that the said article contained less than 15 per cent of protein, less than 6 per cent of fat, and more than 12 per cent of fiber. Adulteration was alleged for the further reason that substances, to wit, various weed seeds and traces of ground grain and flax screenings, had been substituted wholly or in part for barley and flax, which the article purported to be.

Misbranding of the barley and flax was alleged for the reason that the article was represented as complying with a guaranteed analysis which was made a part of a confirmation of sale, and that said statements of guarantee, to wit, "Protein 15% Fat 6% * * * Fibre 12%," were false and misleading, and for the further reason that by the said invoice and confirmation of sale the article was represented as containing not less than 15 per cent of protein, not less than 6 per cent of fat, and not more than 12 per cent of fiber so as to deceive and mislead the purchaser into the belief that it contained not less than the said amounts of protein and fat and not more than the said amount of fiber, whereas, in truth and in fact, it contained less protein than 15 per cent, to wit, 12.43 per cent, it contained less fat than 6 per cent, to wit, 5.3 per cent, and it contained a greater amount of fiber than 12 per cent, to wit, 16.75 per cent.

On April 27, 1923, the defendants entered pleas of guilty to the information, and the court imposed a fine of $150.

C. F. MARVIN, *Acting Secretary of Agriculture.*

11442. Adulteration of canned salmon. U. S. v. 1,974 Cases of Canned Salmon. Tried to the court and a jury. Directed verdict for claimant. Case taken to Circuit Court of Appeals on writ of error. Judgment of lower court reversed by Circuit Court of Appeals. (F. & D. No. 14262. I. S. No. 10533-t. S. No. W-847.)

On January 25, 1921, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 1,974 cases of canned salmon, remaining in the original unbroken packages at Seattle, Wash., alleging that the article had been shipped by the Cannery of Alaska Herring & Sardine Co., from Port Walter, Alaska, between the dates of June 28 and November 7, 1919, and transported from the Territory of Alaska into the State of Washington, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: (Can) "Hypatia Brand Pink Salmon."

Adulteration of the article was alleged in the libel for the reason that it consisted wholly or in part of a filthy, decomposed, and putrid animal substance.

On May 20, 1922, A. O. Anderson & Co. having entered an appearance as claimant for the property, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel the claimant filed a motion for a directed verdict in its favor. The court thereupon sustained

the motion for a directed verdict on the grounds set forth in the following opinion by the court (Cushman, *J.*):

"There is little that occurs to me to add to what is said in the opinion of this court in the other case (N. J. 10512). As to the meaning of the statutory words, I find nothing in this case or in the argument to change my view expressed therein.

"I am convinced that under the showing made here there would be nothing to warrant the court in inferring or acting on the assumption that there was anything in doubt regarding the fairness of the samples taken, about which testimony has been given in this case, but, even so, I see no application either of the candy case or the sirup case or the oyster case to this. In the matter of the candy and in the matter of the sirup and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not sampled and not tested, would likewise contain a certain amount of impurity and render them unfit for food under this law. So in the case of the sirup, where it was labeled 'Maple' sirup, the cupidity of the manufacturer having induced him to label as maple sirup certain portions of a shipment that were not in fact maple sirup, the jury would be warranted in applying what they knew about human nature—the doctrine 'if false in one false in all'—that if the seller of the maple sirup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labeled but not sampled he was likewise cheating and defrauding the public by misbranding those. I am not entirely clear about the candy case, but I take it that comes under the same rule.

"Under the Government's own theory, the salmon were rotten before they were put in the cans. The individual fish, in being caught and transported to the cannery and held awaiting canning in the cannery, are subjected to different conditions—one fish is kept out of water longer than another before it is canned.

"I am convinced that the rule that obtains, that is adopted by the department, has grown out of the inconvenience and impractical nature of the problem of sampling each can. The expense of cutting open the cans and recanning the pure fish is so out of all proportion to the value of the product after it is canned, that it becomes impracticable to do so. You can not test all the cans without destroying all the product tested and, therefore, they have adopted this rule, but it does not change the meaning of the language in the statute.

"I still adhere to the view that the 'article' of the statute is a single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent or twenty per cent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

"I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses, have discarded and found impure practically the same percentage of salmon that those chemically testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

"I do not say that the department, after investigation, where the product was in bulk, where you could treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that 'everyone has to eat his peck of dirt sometime'—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find ten per cent or

twenty per cent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

"The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding in the absence of positive language leaving no room for doubt, that it was the intent to destroy 1,600 cases of good salmon out of a total of 2,000 cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff call the jury in."

Thereupon the court directed the jury to find a verdict in favor of said claimant.

On September 20, 1922, the Government having perfected an appeal, the case came up for review on a writ of error before the United States Circuit Court of Appeals for the Ninth Circuit. On November 11, 1922, the Circuit Court of Appeals reversed the judgment of the lower court as will more fully and at large appear from the following decision (Rudkin, *D. J.*):

"This is a proceeding by libel under the Pure Food and Drug [Drugs] Act (34 Stat. 768) for the condemnation of 1,974 cases of canned salmon. The proceeding is based on the following provision of section 7 of the act: 'That for the purposes of this Act an article shall be deemed to be adulterated: * * * In the case of food: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.' The case was tried before a jury on the demand of the Government, as provided in section 10 of the act.

"It appeared from the testimony on the part of the Government that 408 cans were selected at random from 408 of the 1,974 cases on three different occasions, 24 cans in the first lot, 192 cans in the second lot, and 192 cans in the third lot. The chemist who made the analysis of the first lot of 24 cans was not available as a witness and there is no evidence in the record as to their quality or condition. One hundred and forty-four cans of the second lot were first analyzed, and these were found to contain 28 putrid or tainted cans and 18 stale cans. The remaining 48 cans of the second lot were later analyzed and found to contain 8 putrid or tainted cans and 1 stale can. The third lot of 192 cans was also analyzed, and was found to contain 35 putrid or tainted cans and 12 stale cans. A putrid or tainted can is one containing rotten and decayed salmon whose odor is offensive to the smell. A stale can is one plainly disclosing the beginning of decomposition, but not in so advanced a stage as the putrid or tainted one. It thus appeared that nearly one-fifth of the product analyzed was putrid or tainted and approximately one-fourth either putrid or tainted or stale. It further appeared that the condition of the salmon was apparent on ordinary inspection when exposed, and that decayed salmon is not injurious to health. The claimant offered no testimony. and upon its motion the court directed the jury to return a verdict in its favor. From the judgment on the verdict the plaintiff sued out the present writ of error.

"Rudkin, district judge (after stating the facts as above) delivered the opinion of the court. The court below directed a verdict in favor of the defendant in error upon the ground that the article of food referred to in the statute is the single or individual can of salmon and not the entire case or lot. If this interpretation of the statute is correct the Government, of course, failed in its proof, and will of necessity meet the same fate in every other case of this kind unless it is able to prove that each and every part and parcel of the food product is adulterated within the meaning of the law. Is this a correct interpretation of the statute?

"'The ordinary definition of the word "article" is an extremely comprehensive one. In the primary meaning, as given in the dictionaries, it designates one thing or many, one item of several, a portion of complex whole. The best source, however, to which we should apply to determine the definition of a word used in a statute is the statute itself.' (Junge *v.* Hedden, 37 Fed. 197; Id., 146 U. S. 233.)

"The meaning of the word 'article' must therefore be gathered from a consideration of the entire act, and we may add in this connection that the rule of strict construction invoked by the defendant in error has little or no application

to statutes designed to promote the public health or public safety. Section one of the act prohibits the manufacture within any Territory or the District of Columbia of any article of food or drugs, adulterated or misbranded within the meaning of the act; section two prohibits the introduction of any such article into any State or Territory or into the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country; section six defines adulteration; and section ten prescribes the procedure for the condemnation. In all of these sections we are convinced that the word 'article' is used in its broad and comprehensive sense, and has reference to the food product, not to the smallest individual container. Any other construction would defeat the entire purpose of the law. If the contention of the defendant in error is sound, it is subject to a fine of not exceeding two hundred dollars for each can of salmon introduced into the State, and to a fine of not exceeding three hundred dollars for each subsequent offense. Against such a claim on the part of the Government or such a construction of the statute, we think the defendant in error would have just and ample grounds for complaint.

"The defendant in error seeks to uphold the judgment on other grounds. First, it is urged that decomposition sets in immediately after the death of animals or fish; that a literal construction of the act would exclude from interstate commerce all canned fish and meat products; that for this reason the court must hold that Congress intended to prohibit the introduction into interstate commerce of products containing an unreasonable amount or quantity of decomposed matter only, and that the statute as thus construed is void for uncertainty under the decision in U. S. *v.* Cohen Grocery Co., 255 U. S. 81, and kindred cases. This argument is more specious than sound. Decomposition may begin where life ends, but meat or fish is not decomposed at that early stage. Decomposed means more than the beginning of decomposition; it means a state of decomposition, and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent. Answering a similar contention in U. S. *v.* Two Hundred Cases of A. T. Catsup, 211 Fed. 780, the court said:

"'It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance," the Government can not prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears as in this case, that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law.'

"The case answers the further contention on the part of the defendant in error that adulterated salmon is not injurious to health or dangerous to life.

"'It was also urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drug [Drugs] Act, on which this proceeding is based.'

"It appeared from the cross examination of the Government witnesses that they have heretofore suffered canned salmon containing a small percentage of filthy, decomposed, or putrid matter to pass in interstate commerce unchallenged, but there is no room for controversy over percentages under the statute itself, for it excludes all. Of course, where the entire product is not inspected or tested the proof must go far enough to satisfy the court or jury that the adulteration extends to the whole product sought to be condemned. And while a small percentage of adulteration found only in a small percentage of the product might not and would not ordinarily satisfy the court or jury that the whole product is adulterated, yet in a case like this, where the jury might properly infer or find that approximately one-fifth of the entire product was unfit for human consumption and that the adulteration extended to the entire product, no such question can arise.

"It is further argued that the court should not destroy 1,600 cases of good salmon because 400 cases of the same lot are found to be adulterated. In answer to this we need only say that destruction does not follow condemna-

tion as a matter of course. Section ten of the act provides for the restoration of the goods on payment of the costs and the giving of a sufficient bond to the effect that the articles will not be sold or otherwise disposed of contrary to the provisions of the act. Under this provision the defendant in error may, and will doubtless be permitted to, separate the good from the bad, and the burden of so doing should rest upon it, and not upon the Government or the ultimate consumer. If it can not do this, it is its own misfortune and it must suffer the consequences.

"The judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion."

Steps are being taken on behalf of the claimant to have the decision of the Circuit Court of Appeals reviewed by the Supreme Court of the United States.

C. F. MARVIN, *Acting Secretary of Agriculture.*

11443. Adulteration and misbranding of butter. U. S. v. 10 Cases of Avondale Creamery Butter. Decree of condemnation entered. Product released under bond to be reworked and relabeled. (F. & D. No. 16378. I. S. No. 8196-t. S. No. E-3895.)

On or about June 6, 1922, the United States attorney for the Southern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 10 cases of Avondale creamery butter, remaining unsold in the original unbroken packages at Savannah, Ga., alleging that the article had been shipped by Morris & Co., from Nashville, Tenn., May 23, 1922, and transported from the State of Tennessee into the State of Georgia, and charging adulteration and misbranding in violation of the Food and Drugs Act, as amended. The article was labeled in part: "Avondale Fine Creamery Butter One Pound Net."

Adulteration of the article was alleged in the libel for the reason that excessive water had been mixed and packed with and substituted in part for the said article.

Misbranding of the article was alleged for the reason that the statements on the labels of the cartons containing the article, regarding the article, "Butter One Pound Net," were false and misleading since the said article was not pure butter and the packages did not contain one pound net but did contain less than that amount. Misbranding was alleged for the further reason that the article was food in package form, and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

On or about June 20, 1922, Morris & Co., Inc., having appeared as claimant for the property and having admitted the allegations contained in the libel and filed a bond in the sum of $310.50, in conformity with section 10 of the act, conditioned upon the compliance by the claimant with the decree of the court, judgment was entered ordering that the product be released to the claimant to be reshipped to the Belle Meade Butter Co., Nashville, Tenn., to be reworked, repacked, and relabeled by the said Belle Meade Butter Co., under the supervision of this department.

C. F. MARVIN, *Acting Secretary of Agriculture.*

11444. Misbranding of vinegar. U. S. v. 417 Kegs of Vinegar. Default decree of condemnation, forfeiture, and sale. (F. & D. No. 16605. I. S. Nos. 8538-t, 8539-t. S. No. E-4040.)

On or about July 12, 1922, the United States attorney for the Eastern District of Virginia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 417 kegs of vinegar, remaining unsold in the original kegs at Sewell's Point, Va., alleging that the article had been shipped by the Brocton Products Co., Brocton, N. Y., on or about May 24, 1922, and transported from the State of New York into the State of Virginia, and charging misbranding in violation of the Food and Drugs Act. The article was labeled in part: "16 Gall. Pure Cider Vinegar 45 Gr."

Misbranding of the article was alleged in substance in the libel for the reason that the following statements regarding the said article, to wit, "16 Gall. Pure Cider Vinegar," were false since the article contained evaporated apple products.

On March 14, 1923, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be rebranded and sold by the United States marshal.

C. F. MARVIN, *Acting Secretary of Agriculture.*